

# Counseling Conscience

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At various times while working on a response to this hypothetical, I have wondered whether the organizers of this cross-professional symposium weren't hedging their bets when they asked me to participate. For a number of years I was a public defender in a large urban jurisdiction—a "guilty project," to borrow a phrase—when I made what some would consider a rather abrupt career change: I became the director of an innocence project. Having traveled to both countries, and become conversant in the language and customs of each, I worried that I was expected to offer a novel perspective.

Debate about the intersection of morality, ethics, and the law has always been a hot topic, but in some ways the rise of innocence work has rejuvenated it. Generally speaking, the conception is that the current exclusive focus of some on freeing the innocent incarcerated carries with it a fundamental shift of lawyering principles—one that places factual innocence at odds with and above those of traditional adversarial advocacy. There is a sort of ideological purity in innocence work, so the argument goes, that traditional advocacy can never attain because traditional advocacy's ideology will always be co-opted by lawyers and legal institutions that value the ends over the means.<sup>1</sup> Professor Abbe Smith has distilled the dichotomy in a slightly different way, writing that the most important asset a criminal defense lawyer can bring to the table for his or her client "accused of a terrible crime" is "suspension of judgment."<sup>2</sup> In my current job as an innocence lawyer, I am paid to do precisely the opposite. Judging is everything. My clients are either innocent, or out of luck.

With that as an introduction, however, my thoughts about how I would counsel Steven—which include the hypothetical's "moral" considerations—have not changed given my shift from public defender work to directing an innocence project. If anything, they have been strengthened by it. I feel pretty confident that a robust discussion with Steven about his predicament, including explicit mention of "moral" considerations, needs to occur, whether or not Steven brings these subjects up. Precisely what the parameters of that conversation might look like

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<sup>1</sup> For a much more learned and articulate discussion of this very complex area, a good starting place is William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29 (1978), and David Luban's response to it, *Reason and Passion in Legal Ethics*, 51 STAN. L. REV. 873 (1999).

<sup>2</sup> Abbe Smith, *Defending Defending: The Case for Unmitigated Zeal on Behalf of People Who Do Terrible Things*, 28 HOFSTRA L. REV. 925, 928 (2000).

seems less important than the fact that I would absolutely have the conversation in the first place.

When I first considered this hypothetical I immediately thought about a case that I became involved with early on as an innocence practitioner. It was not my case initially, by which I mean that my client did not come walking through my door shortly after the incident. Instead, my client came to me via his post-conviction case and after he had been locked up for years. Eighteen to be exact. The court had granted him—along with his two co-defendants—a re-trial based on a raft of newly discovered evidence, much of it pointing to his factual innocence.

The relevant facts are these: In the late 1980s, Jefferson Parish, Louisiana was, like a lot of places in this country, overrun by crack cocaine. Drug murders were rampant. In 1992, an individual was shot to death in what was almost assuredly a drug-related incident in a drug-infested part of the parish. Three people were charged with the offense, one of whom, the alleged triggerman, would years later become my client. After the three defendants were arrested, the trial court appointed counsel to represent them. The same counsel. One lawyer; three co-defendants. Such was the level of practice that no one seemed to notice, or, if they did, cared enough to say anything about it.

The evidence against the three was fairly thin. At some point early on in the case, however, a former client of the defense lawyer walked through the lawyer's office door. The client was "in the life," just as in this hypothetical. He told his lawyer that he had a few concerns: Now that three individuals had been arrested for the murder, should he still be worried? Were there likely to be any additional arrests? In other words, he wanted to know, was he in the clear?

It is fair to say that there are any number of things that the lawyer could have done in that situation, many of which are the subject matter of this hypothetical. The one he chose really could not have been any worse for his three charged clients, and, I would argue, for the client standing in his office. The latter he told to stop talking and leave. As for the others, he represented all three at their trial. Convicted, they were sentenced to life in prison. Had it not been for the work of some dogged lawyers many years later, that would have been the last that anyone would have ever heard about the incident and the series of egregious errors committed by the attorney. Or, put another way, the errors that occurred in that lawyer's office and at the trial of the innocent defendants would have remained unknown to all but the innocently-convicted defendants. The verdicts would have been considered just, and by extension the lawyer's representation legally competent.

This case, like most of the innocence cases that I deal with, offers up valuable lessons, many of which are not about innocence *per se* as much as they are about the ways that criminal clients, like my client in the murder case or Steven in our hypothetical, tend to experience our criminal justice system—or a discrete part of it—when they are counseled by the lawyers appointed to help them. Most of these lawyers, it would appear, never worked their way through a hypothetical like this one, and were never forced to think about the obligations and duties of their

profession. Worse still, nothing about their choice of career compelled or forced real accountability for their *not* thinking about it. The net result is that their clients bear the frequently shameful, and sometimes tragic, results.

I do not think that it overstates the case to say that prevailing norms actually encourage this state of affairs because they refuse to recognize and give adequate attention to a critical component of what attorneys should be obligated to do for their clients. While attorneys must offer legal expertise to their clients, they must offer counsel and advice to their clients, too. But the fact is that this aspect of lawyering has, for a host of reasons, fallen out of favor. This hypothetical offers a good opportunity to understand why we need to emphasize an approach that not only does not demean the role of lawyer as counselor, but that actually requires it as a matter of course as a key ingredient in competent and effective representation.

To understand what I mean, it may be helpful to think of what lawyers do for their clients as falling into two categories.<sup>3</sup> The first is to act as an “alter ego” for the client, to stand in the client’s stead, by negotiating a settlement, for example, or, in a criminal case, entering a plea of “not guilty” at an arraignment. The distinguishing feature, at least for understanding what I am after, is that these are acts that bind the client to a particular legal position. Whether a lawyer’s actions as an alter ego are effective and satisfactory to the client depends on the much broader second category, however, what is really the daily bread and butter of lawyering: the offering of specialized assistance—advice and counsel, really—that in this hypothetical should form the bases for Steven’s autonomous, informed and considered decisions.

It is critical to understand two things about these categories: they almost always merge, and each is dependent on the other for the ultimate success of the representation. The problem is that the popular conception—in fact the lawful one when it comes to judging the effective assistance of counsel—focuses only on how well the lawyer acted in the role of alter ego. What the lawyer’s role may have been with respect to the advice and counsel portion of the job is rarely discussed because in the calculus of effective assistance it is factored out. The touchstone for effective representation, according to the Supreme Court, is a “just” result.<sup>4</sup> Clients do not consult lawyers in order to gain a just result in their case. Likewise, it is a pretty low bar for lawyers to meet. Far too many lawyers involved in indigent defense, in my opinion, aspire to it.

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<sup>3</sup> I owe significant debt to Professor George C. Thomas III and his article, *History’s Lesson for the Right to Counsel*, 2004 U. ILL. L. REV. 543 (2004), not only for the concepts and terms of art that I have borrowed to explain these distinctions, but also for an exhaustive, illuminating, and readable treatment of several concerns that are at the heart of my thinking about this hypothetical.

<sup>4</sup> See, e.g., *Strickland v. Washington*, 466 U.S. 668, 687 (1984): “First, the defendant must show that counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.”

Consider the leading case on the subject, *Strickland v. Washington*,<sup>5</sup> and the results that have flowed from it. First, *Strickland* requires the appellate court examining the lawyer's conduct to presume that the representation was competent.<sup>6</sup> That presumption can be rebutted, but even in the event that there is a finding that the lawyering was incompetent it does not necessarily follow that the defendant will receive relief. The second requirement of *Strickland* requires that the defendant also show that the lawyer's deficient performance actually prejudiced the case's outcome.<sup>7</sup> If the outcome was "just," in other words, whatever poor lawyering occurred is beside the point.<sup>8</sup>

In the vast majority of cases where a *Strickland* claim is raised, a reviewing court is examining a record where the government took advantage of every opportunity through its investigation and prosecution of the case to create a record that will defeat *Strickland*'s prejudice prong, in many instances while the defense attorney provided deficient trial performance and made no effort to develop a trial theory or the evidence to support it.

The results are not surprising: Lawyers who fell asleep during trial, showed up drunk, failed to make an opening statement, were unable to name a single relevant decision and failed to present mitigating evidence in a death penalty case, have all been found effective.<sup>9</sup> And these are the cases where *Strickland* claims were actually raised. In almost all serious felony cases, access to post-conviction counsel is not a constitutional or statutory requirement, which means that indigent defendants—and let us be clear, criminal defense in this country is almost exclusively *indigent* criminal defense—are left to raise their claims *pro se*.<sup>10</sup> Investigating a years-old case to supplement the record for a *Strickland* claim is a daunting process; trying to do it while incarcerated is almost impossible. The result is that the lawyering in most cases never gets meaningfully reviewed. These

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<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 687–91.

<sup>7</sup> *Id.* at 692.

<sup>8</sup> Some might point out that *Padilla v. United States*, 639 F.3d 892 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 254 (2011) changes this calculus slightly because the issue—a lawyer's failure to advise a client about immigration consequences of a plea offer—actually considers for the first time a lawyer's advisory role *vis a vis* a client, as opposed to a purely outcome determinative approach. Even if this view of *Padilla* is accurate, the overall approach to the lawyering process is not viewed any differently by the Court, nor is the test to determine whether counsel was ineffective. I would argue that this proposition remains true even after *Missouri v. Frye*, 132 S. Ct. 1399 (2012) and *Lafley v. Cooper*, 132 S. Ct. 1376 (2012) (holding that criminal defendants have a Sixth Amendment right to effective assistance of counsel during plea negotiations).

<sup>9</sup> See, e.g., *Romero v. Lynaugh*, 884 F.2d 871, 872 (5th Cir. 1989) (failure to present mitigating evidence); *Jackson v. State*, 290 S.W.3d 574, 587 (Ark. 2009) (sleeping attorneys); *Ex Parte McFarland*, 163 S.W.3d 743, 753 (Tex. Crim. App. 2005) (same); *People v. Garrison*, 765 P.2d 419, 440 (Cal. 1989) (drunk attorneys); *Bell v. State*, 879 So. 2d 423, 442 (Miss. 2004) (failure to make an opening statement).

<sup>10</sup> See *Evitts v. Lucey* 469 U.S. 387, 395 (1985); *Douglas v. California*, 372 U.S. 353, 366 (1963).

are the cases I see in my office: cases where counsel routinely waive opening statements, proceed to trial without a theory of defense, inculcate their client through inept cross-examinations of crucial witnesses, and, more times than I can count, fail to put on a viable defense case at all.

If these are the results of the *lawyering* in the case, imagine what kind of advice and counsel was being offered. These are cases where clients meet their lawyers shortly before trial, where no meaningful investigation was undertaken, where discussions about a plea, to the extent that they are ever conducted, occur on the eve of trial. To read these transcripts is to feel a palpable absence of the defendant. There are never any pauses while the lawyer consults with his client about a potential juror, for example; there are few instances where a lawyer will consciously refer to his client as a real person and not simply as a criminal defendant. The end result is that the defendant seems for all intents and purposes to be separate from the entire process when, in fact, the defendant should be the process's central concern.

This acceptance of minimal-quality lawyering misses out on so much of what lawyering is—its heart, really. Steven did not show up at our office in search of this kind of lawyering, of course, but absent a lawyer willing to act as both an alter ego and as a counselor, this is what Steven will get.

Unfortunately, counseling a client does not pay very much—literally and figuratively. Fees in most jurisdictions are capped at some laughably low figure, and courts and legislatures are loath to do much about it.<sup>11</sup> No one will worry themselves overmuch about how often—or even if ever—a lawyer meets with his client prior to trial in order to build the kind of attorney-client relationship based on trust and respect that is essential to any meaningful definition of effective advocacy. Lawyers can get away—and do all the time—with either not investigating their cases, or investigating them minimally. No one will ever know, for instance, whether the lawyer bothered to go to the crime scene in advance of the preliminary hearing. Most courts would not approve the fee, anyway. But understanding the scene and speaking to witnesses prior to the hearing is critical.

In my experience, clients who do complain about their court-appointed lawyer's performance have difficulty articulating precisely what their dissatisfaction is. It is no wonder; their intuitive (and correct) sense that their lawyer is failing them is not a legally cognizable error. In several instances I have observed the client, after his complaints are dismissed, placed under oath at his lawyer's request and asked to affirm the court's finding of his lawyer's

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<sup>11</sup> In Mississippi, for example, prosecutors receive full-time salaries while indigent defense representation is provided by lawyers who work on a flat-fee contract. A study of all felony cases in Quitman County, Mississippi, found that 42% of indigent criminal cases were resolved by guilty plea at arraignment. For most clients this was the first time that they had met their lawyer. See ABA COMM. ON LEGAL AID AND INDIGENT DEFENDANTS, *GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE: A REPORT ON THE AMERICAN BAR ASSOCIATION'S HEARINGS ON THE RIGHT TO COUNSEL IN CRIMINAL PROCEEDINGS* 16 & 55 n.150 (2004).

competence in order to preclude a later claim of ineffectiveness of counsel. One can imagine how much that does to advance the attorney-client relationship.

Providing both categories of lawyering is a full-time job; it is nearly a way of life. Ask anyone who litigates this way. Worse still, this kind of representation is fraught with pitfalls. It demands that lawyers take risks and that they have conversations and give advice about issues that are not often squarely within their comfort zone. Sometimes that level of advice can quickly turn to something that feels a lot like coercion. It is a lot easier to let a client who is initially insistent on accepting a terrible plea offer take the plea than it is to convince the client to turn it down so that you can investigate the case, file pretrial motions and work your way to a better deal. It is frequently more trouble to show up for jail visit after jail visit in order to brow beat a client into accepting a plea offer that will not get any better—that may save his life—than it is just to appear in court and try the case.

Which leads me to a final point: the lawyer could be wrong about the plea getting better, or the outcome of the case itself. Show me a lawyer who has not advised a client to plead because the case is “hopeless” that, after the client rejects the plea offer, tries the case and receives a verdict convicting on a lesser charge, or even an acquittal, and I will show you a lawyer who has not tried enough cases. Lawyering is about risk, and in my view some of that risk has to be borne by the lawyer. It is a tough job. It hurts sometimes. There is a cost. On balance, though, I believe that efforts that attempt to minimize risk are really not much more than a kind of dissembling legal arbitrage. No matter how much disclosure is made to the client, it is really aimed at one thing: letting the lawyer sleep better at night.<sup>12</sup>

All of this may seem a long, slow wind-up for what I believe is absolutely the obvious thing to do for Steven. Not only must the lawyer provide answers to his basic questions about what he should do—whether or not he should come forward or stay silent about his involvement—but the lawyer must also counsel him about how he ought to consider making those decisions. As a preliminary matter, a lawyer would need to inform Steven that David’s conviction likely means that Steven’s own legal exposure is virtually non-existent. If history is any indication, the likelihood of the prosecution ever reversing course and implicating Steven as the true perpetrator is hardly worth his consideration. (In fact, even if Steven chose to come forward, he may have a difficult time selling his involvement to prosecutors this late in the game.)

But he would also need to be counseled about what it means to stay silent—for him, for David, and to anyone else affected by his decision. Steven’s voice and appearance in the lawyer’s office suggest that he is upset by this experience. Whether he is worried because he still feels vulnerable to being prosecuted or

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<sup>12</sup> In the event that I am being too opaque, I am thinking primarily of those who advocate for the “Truth Model” of lawyering, which holds that a lawyer must identify his own personal standards of truth and integrity and then abide by those in practice, especially when legal representation would supplant moral representation. In this hypothetical, any number of difficult aspects of advising Steven could be avoided by subscribing to this school of thought.

whether he feels guilty because of what occurred to David, or both, should absolutely be part of the discussion. Steven himself may not know precisely how he feels. Or why. It would be up to the lawyer to help him navigate those issues.

It is also possible, of course, that Steven arrives and asks *none* of these questions or voices much in the way of any real depth of concern. My answer in this scenario derives from the same approach: it would be incumbent upon the lawyer to raise the questions and potential issues and present them to Steven as things he needs to consider in order to make an informed decision about what actions he should take.

With respect to the specific substance of the answers to Steven's concerns, I believe that a lawyer's counsel and advice has to include moral considerations—whether, for instance, Steven has considered what it might mean to save an innocent person from punishment by accepting responsibility for his actions, or whether and how those considerations ought to have any bearing on his decisions at all. These considerations may well derive from the lawyer's own moral beliefs; they may be contrary to them. The lawyer is certainly free, in my view anyway, to identify which is which to Steven. But the lawyer is obligated to have these discussions not because it is the *moral* thing to do—it may or may not be—but because they are central to acknowledging Steven's dignity as a client. They are also central to the art and craft of being a complete lawyer.

And one more thing: I would also go so far as to say that I could foresee forcing Steven to contemplate scenarios that he may not want to consider, or even twisting his arm to change his mind in the event that I believed his decision would not ultimately be in his best interest. That may seem counter to the model of client-centered lawyering that I have been advocating. It is not. It is simply refusing to use that concept as an excuse to avoid full engagement with Steven. Steven has a series of difficult and unpleasant decisions to make. He needs the strength and wisdom to make them.

When I think of the places I have typically had these conversations with clients, I think of sitting in pods under the watchful eyes of prison guards, of trying to speak to my client via a malfunctioning phone and several inches of glass between us. I think of the garish spectrum of colored jumpsuits that various departments of corrections use as prison uniforms. I think of the smell. The best part of this hypothetical is that Steven comes to my office. One that I imagine is modest but tastefully appointed with comfortable chairs and a quiet place to talk, the better to enjoy the long series of difficult but absolutely necessary conversations that lie ahead of us.

